

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. RALPH S. BEREN, ED.D.,

Plaintiff,

v.

BOARD OF TRUSTEES OF CALIFORNIA
STATE UNIVERSITY, et al.,

Defendants

No. C-06-4706 MMC

**ORDER GRANTING ELK GROVE
DEFENDANTS' MOTION TO DISMISS;
GRANTING CSU DEFENDANTS'
MOTION TO DISMISS OR,
ALTERNATIVELY, FOR SUMMARY
JUDGMENT; DISMISSING SECOND
AMENDED COMPLAINT WITH LEAVE
TO AMEND; VACATING HEARING**

Before the Court are two motions: (1) the motion to dismiss plaintiff Ralph S. Beren's Second Amended Complaint ("SAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed April 30, 2007, by defendants Elk Grove Unified School District ("EGUSD") and Elizabeth Kaneko ("Kaneko") (collectively, "Elk Grove Defendants"); and (2) the motion to dismiss the SAC pursuant to Rules 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment pursuant to Rule 56, filed April 30, 2007, by defendants Board of Trustees of California State University ("Trustees"), California State University ("CSU") and Nathan Avani ("Avani") (collectively, "CSU Defendants"). Plaintiff has filed a single opposition to both motions, to which the Elk Grove Defendants and CSU Defendants have separately replied. Having considered the papers filed in support of and in opposition to the motions, the Court deems the matter suitable for decision on the papers, VACATES the

1 hearing scheduled for June 15, 2007, and rules as follows:

2 1. Plaintiff's First Cause of Action, alleging a claim under 42 U.S.C. § 1983, is
 3 subject to dismissal, with leave to amend. As defendants point out, plaintiff fails to allege
 4 sufficient facts to support a finding that Kaneko and/or Avani deprived plaintiff of any
 5 specific federal right. Plaintiff's reliance on ¶¶ 11, 12, 43, and 44 of the SAC, (see Pl.'s
 6 Opp., filed May 25, 2007, at 5:8-24), is misplaced. Although the paragraphs on which
 7 plaintiff relies identify federal constitutional provisions, i.e., the "First Amendment Rights to
 8 Freedom of Speech and Petition," (see SAC ¶ 11), and federal statutes, i.e., "20 United
 9 States Code 794 et seq.," (see SAC ¶ 12), said paragraphs consist entirely of legal
 10 conclusions that Kaneko and Avani deprived plaintiff of the federal rights identified therein.¹
 11 Such conclusory allegations are insufficient to plead a claim. See Bell Atlantic Corp. v.
 12 Twombly, 127 S. Ct. 1955, 1964-65 (2007) (holding Rule 8(a)(2)'s requirement that plaintiff
 13 allege "grounds upon which [his claim] rests" requires plaintiff to plead "more than labels
 14 and conclusions").²

15 2. Plaintiff's Second Cause of Action, alleging a claim under California Civil Code
 16 § 52.1, is subject to dismissal in light of plaintiff's having failed to allege that he filed a
 17 government claim with CSU and/or EGUSD before instituting the present action. See
 18 Watson v. State of California, 21 Cal. App. 4th 836, 843 (1993) ("It is well settled that a
 19 government claim must be filed with the public entity before a tort action is brought against

20
 21 ¹Although plaintiff, in support of his argument that he has properly pleaded a claim
 22 under § 1983, does not rely on other paragraphs in the SAC, the Court has considered
 23 whether other paragraphs provide notice of the factual basis for the § 1983 claim. No such
 24 paragraphs exist. For example, with respect to the claim that plaintiff was deprived of due
 25 process, the SAC does not allege that Avani's decision to demote plaintiff occurred without
 plaintiff's having been provided a hearing. Further, in light of plaintiff's allegation that the
 terms of his employment were no longer covered by a collective bargaining agreement at
 the time he was demoted, (see SAC ¶ 37), the factual basis of plaintiff's allegation that he
 had any right to continued employment is not provided.

26 ²Defendants argue that plaintiff should not be afforded leave to amend because the
 27 Court has previously afforded plaintiff such opportunity. The Supreme Court's decision in
 28 Bell Atlantic, which clarified Rule 8(a)(2), was issued after plaintiff filed the SAC.
 Accordingly, the Court will afford plaintiff one further opportunity to amend in order to
 provide defendants with sufficient notice of the factual basis for his federal claims, under
 the standard set forth in Bell Atlantic.

the public entity or public employee.”); see also Ortega v. O’Connor, 764 F. 2d 703, 707 (9th Cir. 1985) (holding failure to file government claim is bar to maintaining state law claim against public entity and its employees), rev’d in part on other grounds, 480 U.S. 709 (1987). Because plaintiff does not assert he filed a government claim, the Second Cause of Action will be dismissed without further leave to amend.

3. Plaintiff’s Third Cause of Action, alleging a claim under 42 U.S.C. § 1985, is subject to dismissal, with leave to amend. For the reasons stated above with respect to the First Cause of Action, plaintiff has not alleged sufficient facts to give notice of the basis of his claim that Kaneko and/or Avani deprived plaintiff of any federal right.

4. Plaintiff’s Fourth Cause of Action, alleging a claim under 29 U.S.C. § 794, is subject to dismissal, with leave to amend as against CSU and EGUSD.³ As defendants point out, plaintiff does not allege any factual basis for the legal conclusion that he is disabled, specifically, plaintiff fails to allege any facts to support a finding that he has a “physical or mental impairment that substantially limits one or more of the major life activities.” See Walton v. U.S. Marshals Service, 476 F. 3d 723, 727 (9th Cir. 2007) (setting forth definition of “disability” for purposes of § 794). Further, with respect to EGUSD, plaintiff fails to allege any facts providing notice of the basis for his allegation that EGUSD was plaintiff’s employer. (Cf. SAC ¶ 10 (alleging plaintiff had employment contract with CSU).)

5. Plaintiff’s Fifth Cause of Action, alleging a claim for “discrimination and retaliation” under California Government Code § 12900, (see SAC at 20:3-5), is subject to dismissal without leave to amend, because, for the reasons stated by defendants, plaintiff has failed to exhaust his administrative remedies.

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³Plaintiff concedes he cannot maintain a claim under § 794 against the individual defendants. (See Pl.’s Opp. at 8:3-5.)

1 pursuant to Rule 15(a).

2 **IT IS SO ORDERED.**

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4 Dated: June 11, 2007

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MAXINE M. CHESNEY
United States District Judge